COPY

Supreme Court, U. S.
FILED
JAN 12 1979
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-834

ROY HUBBARD, ET AL.,
Petitioners,

vs.

JIM AMMERMAN, ET AL.,
Respondents.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS

EARL SHARP
P. O. Drawer 3106
Longview, Texas
FRANKLIN JONES
P. O. Drawer 1249
Marshall, Texas
Attorneys for Petitioners

FRANKLIN JONES
P. O. Drawer 1249
Marshall, Texas
Of Counsel

R. L. Montgomery, Inc., 920 Cherry Street, Kansas City, Mo. 64106, 471-2020

TABLE OF CONTENTS

List of Authorities I

TOPICAL INDEX

"History of This Litigation" 2-3
"Petitioners Are Bound by the Judgment of the State Appellate Court" 4-5
"The State Court Proceedings Should Not Have Been Enjoined" 5-6
"Ammerman Was Not Bound by the Erroneous Findings of the State Trial Court" 6-8
"The Claim That Ammerman's Counsel Stipulated on Jurisdiction" 8-9
Conclusion 10
Certificate of Service 11

List of Authorities

CASES

Atlantic Coastline RR. v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739 4
England v. *Louisiana Medical Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461 ..... 4, 5, 6
Harman v. *Forssenius*, 380 U.S. 528, 537, 14 L. Ed. 2d 50, 57 6
Johannessen v. *United States*, 225 U.S. 227, 238, 56 L. Ed. 1066, 1070 7
Mitchum v. *Foster*, 32 L. Ed. 705, 709 4
Phillips v. *United States*, 312 U.S. 246, 252, 85 L. Ed. 800, 805 6

Polk v. *Davidson* (Tex. Sup. 1946), 196 S. W. 2d 632 ... 6
Zdanok v. *Glidden Co., Durkee, Etc.*, 327 F.2d 944, 945, 955 (2d Cir. 1964) ... 7

STATUTES

Texas Statutes, Art. 13.30(12) ... 6
28 U.S.C., §2281 ... 6
42 U.S.C., §1983 ... 3,4

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment XIV ... 3

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-834

ROY HUBBARD, ET AL.,
Petitioners,

vs.

JIM AMMERMAN, ET AL.,
Respondents.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS

TO SAID HONORABLE COURT:

This reply is addressed to arguments first raised in the brief in opposition to the petition. In general, we follow the topical arrangement in the opposition brief.

"HISTORY OF THIS LITIGATION"

Collins would have been satisfied with the termination of the election contest by the holding of a new primary election, as evidenced by his unsuccessful effort in the Texarkana Appeals Court to mandamus the Democratic Executive Committee to carry out the State Court judgment ordering the new election (App. 4 and 14). Ammerman procured an order from the State Trial Court fixing the time for preparation of the transcript and statement of facts as October 10, 1970 (Pls. Exh. 3, pp. 150-153), three days later than the deadline for ordering printed ballots for the general election (App. 14-15). Thereafter, he vigorously and successfully opposed efforts of counsel for Collins to shorten the time for preparation of the record and disposition of the appeal (Pls. Exh. 67). It was only after Collins realized that Ammerman intended to force procedural delays to bring into play the malodorous "mootness doctrine" (Pet. For Writ, p. 4, App. pp. 71-74) that he sought to shorten disposition of the case in the appellate court by bringing the case up through an alternative route of appeal.[1] He was thwarted in this effort through the studied and deliberate attempt of the Texarkana Appeals Court to avoid deciding the election contest case on its merits prior to the date of holding the

1. Texas Rule of Civil Procedure 307: "In non-jury cases, where findings of fact and conclusions of law are requested and filed, and in jury cases, where a special verdict is returned, any party claiming that the findings of the court or the jury, as the case may be, do not support the judgment, may have noted in the record an exception to said judgment and thereupon take an appeal or writ of error, where such writ is allowed, *without a statement of facts* or further exceptions in the transcript, but the transcript in such cases shall contain the conclusions of law and fact or the special verdict and the judgment rendered thereon (emphasis supplied)." See *Ward v. Scarborough*, (Comm. of App. of Texas, Op. adopted by Supreme Court Jan. 11, 1922), 236 S. W. 441.

general election, so as to be able to declare the election contest moot (F.F. ¶35, App. 18).

Respondents suggest (Reply 3) that the Texarkana Appeals Court passed upon the merits of the election contest by the use of this language: "I cannot find where there has been any violation of any Federal or State law whatever." (App. 34). The remark was *obiter dictum*, all the more so since the Court expressly found and decided that no Texas court had jurisdiction to act on the case after the granting of the September 29, 1970 preliminary injunction. Furthermore, it is manifest that the Texarkana Court made no examination of the record on the trial in the State District Court, and simply ordered dismissal for lack of jurisdiction. Lastly, the State Court paid no homage to the Fourteenth Amendment or 42 U.S.C., §1983 and the many cases decided under them. This is understandable, since no part of the record made in the District Court in this case was before the Texas court other than a copy of the preliminary injunction.

It is true that Collins did not seek writ of certiorari from the last Texarkana decision. It is also true that the would-be Intervenors in the election contest decided to have no more of the Texas practice after their plea was denied. Neither the trial nor Texas Appellate Courts made any effort to dispose of the constitutional questions raised in this case, nor were any of them presented to the Appellate Court.

"PETITIONERS ARE BOUND BY THE JUDGMENT OF THE STATE APPELLATE COURT"

This Court specifically held that the *Atlantic Coastline* decision[2] did not apply to a 42 U.S.C., §1983 case in *Mitchum* v. *Foster* (32 L. Ed. 705, 709). Our case is governed by the decision in *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 11 L. Ed. 2d 440, 84 S. Ct. 461. Under the abstention doctrine a three judge Federal Court there stayed proceedings until the Courts of Louisiana had an opportunity to determine the issues. Following an adverse judgment in Louisiana on *all* issues, the plaintiffs returned to the Federal District Court to be met with a dismissal because "the proper remedy was by an appeal to the Supreme Court of the United States" (375 U.S. 414, 11 L. Ed. 2d 444). This Court reversed, because such review "is an inadequate substitute for the initial district court determination" (375 U.S. 416, 11 L. Ed. 2d 445). Among the reasons for the holding was that a litigant may not be unwillingly deprived of a primary fact determination in his case by a federal district court, and, to quote:

> "The possibility of appellate review by this Court of a state court determination may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts. We made this clear only last Term in NAACP v Button, supra, 371 US at 427, 9 L ed 2d at 414, when we said that 'a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim'." (375 U.S. 417, 11 L. Ed. 2d 446).

---

2. *Atlantic Coastline RR.* v. *Brotherhood of Locomotive Engineers*, 398 U.S. 281, 26 L. Ed. 2d 234, 90 S. Ct. 1739.

It is only where "* * * a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, *and has them decided there,* * * *" (emphasis supplied), that it may be said he has elected to forego his rights to return to the district court in an abstention case (*England,* 375 U.S. 419, 11 L. Ed. 2d 447). Respondents do not even attempt to show such an election by the Petitioners, nor could they successfully do so.

"THE STATE COURT PROCEEDINGS SHOULD NOT HAVE BEEN ENJOINED"

The complaint was filed September 10, 1970 (App. 15) after the Petitioners had been denied the opportunity of urging their federal and constitutional rights in the state court (Pls. Exh. 61, p. 108), and after the deliberate attempt of a Texarkana Appeals Court to avoid decision of the case until the contest should become moot had become apparent (App. F.F. XV, p. 5; F.F. 35, App. 18). We do not restate the obvious principles of equity on which the trial court based the preliminary injunction, but refer to the Petition for Writ of Certiorari, pages 14-15.

The language quoted by Respondents (Reply 6) that enjoined voters from writing in the name of the office of County Judge of Harrison County, Texas at the general election was placed in the preliminary order at the request of Respondent Ammerman. We counter the statement of Respondents that the preliminary order was calculated to deprive the state courts of the power of enforcing any final judgment with the obvious reply that the Federal District Court primarily sought to preserve the status quo long enough for the State Courts to make a final and meaningful decision in the election contest. His willingness to

accept such a decision is found in his final action of enforcing the only judgment on the merits entered in the State Court proceedings, by way of applying collateral estoppel to Respondent Ammerman.

The *England* case (pages 4-5, supra) makes wholly untenable Respondents' suggestion that the Petitioners failed to exhaust legal remedies available to them. However, any sort of delay is not to be countenanced in cases involving such a strong national interest as the right to vote (*Harman* v. *Forssenius,* 380 U.S. 528, 537, 14 L. Ed. 2d 50, 57).

No attack was made by Petitioners on the proviso of the Texas Election Code referring to mootness,[3] as suggested by Respondent (Reply 7). Petitioners' complaint has always been at the unconstitutional emasculation of the plain language of the Legislature by the semantic gymnastics of the Texas Court in *Polk* v. *Davidson* (Tex. Sup. 1946), 196 S. W. 2d 632. Section 2281 of Title 28, U.S.C. has no application, since the Texas statute was not challenged on constitutional grounds (*Phillips* v. *United States,* 312 U.S. 246, 252, 85 L. Ed. 800, 805).

"AMMERMAN WAS NOT BOUND BY THE ERRONEOUS FINDINGS OF THE STATE TRIAL COURT"

The findings were not erroneous. The State Trial Court filed extensive findings of fact and conclusions of law, both after the July 27, 1970 judgment (Pls. Exh. 62), and the October 12, 1970 judgment (Pls. Exh. 61, pp. 21-

3. Provided, that no appeal in such cases shall be dismissed as moot merely because of possible interference with the printing of the official ballot unless the appellant has been guilty of negligence in perfecting and prosecuting such appeal, but such appellate court shall retain jurisdiction of such appeal and expeditiously dispose of same (Tex. St. Art. 13.30(12), f.n. App. 41).

49). A thirteen volume statement of facts was made on the first trial, and accepted on the second trial (Pls. Exh. 61, p. 50). The statement of facts and all other instruments in the state proceeding were in evidence before the Federal District Judge, and amply sustained all of his findings.

The District Court concluded that the findings of fact and conclusions of law made by the State Trial Judge in support of his opinion and judgment of July 27, 1970 were the result of full litigation between Collins and Ammerman on the issues determined therein (App. 21). Further, that since those with respect to absentee votes thrown out had been challenged by Ammerman in the Texarkana Appeals Court, but not disputed by it, Ammerman could not later complain that the findings and conclusions did not determine the legality of said votes (id.). Lastly, the District Court concluded that since the Texarkana Appeals Court refused to pass on the merits of the contest case, the decision of the District Court of Harrison County, Texas was the last State ruling on the issues therein, and that the doctrine of collateral estoppel came into play to estop the Defendants to deny or question the findings of fact and conclusions entered following the October 12, 1970 judgment (App. 22).

The basis of estoppel by judgment is that the parties have had their day in court (*Johannessen* v. *United States*, 225 U.S. 227, 238, 56 L. Ed. 1066, 1070). The cases generally speak of the finality of the judgment in considering questions of res judicata, but not conclusively so in considering questions of collateral estoppel. In *Zdanok* v. *Glidden Co., Durkee, Etc.*, 327 F.2d 944, 945, 955 (2d Cir. 1964), Judge Friendly well expressed the principle, thus:

> "Dealing with this very question of the kind of finality of judgment necessary to create an estoppel, we pointed out, quite recently, that collateral estoppel does not require a judgment 'which ends the litigation * * * and leaves nothing for the court to do but execute the judgment,' Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945), but includes many dispositions which, *though not final in that sense, have nevertheless been fully litigated.* Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89 (2 Cir. 1961) cert. denied 368 U.S. 986, 82 S. Ct. 601, 7 L. Ed. 2d 524 (1962), and cases cited. As we there said, '"Finality" in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again'." (emphasis supplied).

To suggest that after more than two months of trial the issues in the State election contest were not fully litigated is to reflect both upon counsel and the tribunal of trial. We urge that the District Court properly applied the doctrine of collateral estoppel against Ammerman.

"THE CLAIM THAT AMMERMAN'S COUNSEL STIPULATED ON JURISDICTION"

The suggestion that we have quoted counsel out of context on page 5 of our Petition prompts us to enlarge upon the quotation, as follows:

> (Mr. Huffman) "Our position would be that your restraining order prevents this case from becoming moot, that since the election is not going to be held on November 3rd, and no date for the election for County

Judge has been set, that this case will not become moot, and that they should go ahead and decide the case on the merits.

"* * *

(The Court) "Suppose the Court of Civil Appeals ignores this order? What power have I got over the Court of Civil Appeals to make them decide a case they don't want to decide?

(Mr. Huffman) "I don't know that this Court could make them decide the case on the merits. They have two alternatives.

"They could say 'We want to do justice, and we will decide the case between the parties or decide it on the merits, and we will either affirm or we will reverse and render judgment for Ammerman.'

"Now, if they do that, I don't anticipate any problem.

"Their other possibility is to say, 'Well, we don't care what Judge Justice has said. We are still going to dismiss it as moot.'

"I don't believe they would do that. I have no guarantee, but if they did, this Court still has control. You would have jurisdiction over when the election would be held and could determine then whose name should go on." (Hearing on Motion to Dissolve Preliminary Injunction, pp. 10-13).

CONCLUSION

The Circuit Court opinion contains an epilogue (App. 65). If that opinion be not corrected, we think a more suitable epilogue might be found in the resignation felt on the part of those electors who do not approve of ballot box stuffing. It may well be found in the poignant and pathetic remarks of an elderly Negro voter, who had her absentee ballot voted against her wishes. Listen to what Annie B. Coats said to one of the ballot box stuffing conspirators:

> "• • • I told him, I say, I ain't casting no vote, 'cause whomsoever they want they going to get them anyhow, and regardless of that vote." (Statement of Facts in the State Trial Court, p. 1190, in evidence in this case).

We reiterate that the Petition for Certiorari should be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

EARL SHARP
P. O. Drawer 3106
Longview, Texas
FRANKLIN JONES
P. O. Drawer 1249
Marshall, Texas

By: .....
Attorneys for Petitioners

FRANKLIN JONES
P. O. Drawer 1249
Marshall, Texas
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply of Petitioners to Brief of Respondents was this the 10th day of January, 1973, placed in the United State Mail, postage prepaid, to Mr. William M. Huffman, P. O. Box M, Marshall, Texas 75670, and Mr. Austin C. Bray, Jr., Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, Attorneys of Record for Respondents.

.....

Of Counsel